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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

BRIEF OF PETITIONER

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THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

THE BLACKFEET INDIAN TRIBE,

Intervener.

BRIEF OF PETITIONER

I.

Reference to Official Report of Case Below.

The case has not yet been officially reported. It will be found reported in 54 Pac. (2d) 129.

II.

Statement of Grounds on Which Jurisdiction Invoked.

(a) *Date of Judgment.*

The original judgment and decree of the Supreme Court of Montana was entered on the 19th day of February, 1936 (R. 49) pursuant to the decision of said court entered on the 22nd day of January, 1936 (R. 25).

(b) *Specific claims advanced and rulings made in State Supreme Court relied upon as basis for Court's jurisdiction.*

In the Supreme Court of Montana, petitioner claimed:

(1) The oil and gas in the land involved in the lease here in question was and is the property of the United States (R. 1. 37).

(2) The taxes sought to be levied are taxes upon the property of the United States and upon an instrumentality of the United States (R. 3, 5, 40).

(3) No consent has been given by the United States for the taxation of the oil and gas in or that is produced from the lands embraced in the lease here involved (R. 3, 42).

(4) The assessment, levy and collection of the taxes here involved is prohibited by the Federal Statutes, the Montana Constitution and the Montana Statutes (R. 3, 37, 42).

With reference to the claims advanced by petitioner the Supreme Court of Montana ruled:

(1) The oil and gas in the land involved in the lease was and is the property of the United States (R. 32, 35).

(2) The taxes sought to be levied are taxes upon the property of the United States and upon an instrumentality of the United States (R. p. 31, 32).

(3) By the provisions of Sec. 398, Title 25 U. S. C. A. (Act May 29, 1924) the United States consented to the levying of the taxes here involved upon the oil and gas produced from the lands embraced in the lease (R. 32, 33).

(4) The assessment, levy and collection of the taxes here involved is not prohibited by Federal Statute, the Montana Constitution or Montana Statute (R. 32, 33, 35, 36).

(c) *Statutory provisions under which jurisdiction of this Court is invoked.*

The decision of the Supreme Court of the State of Montana was rendered January 22, 1936 (R. 25) and its judgment entered February 19, 1936 (R. 49), less than three months prior to the date of the application for the writ of certiorari herein (U. S. Code, Title 28, Sec. 350).

The jurisdiction of this Court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 344) in that petitioner claims a right, privilege and immunity under the Constitution and Statutes of the United States.

(d) *Cases believed to sustain jurisdiction.*

Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;
Gillespie v. State of Oklahoma, 257 U. S. 501, 66 L. Ed. 338;
Longest v. Langford, 276 U. S. 69, 72 L. Ed. 471;
Marlin v. Lewallen, 276 U. S. 58, 72 L. Ed. 467;
Larkin v. Paugh, 276 U. S. 431, 72 L. Ed. 640;
Longest v. Langford, 274 U. S. 499, 71 L. Ed. 1170.

III.

Statement of the Case.

This proceeding was instituted originally in the Supreme Court of Montana by petitioner (R. 1-6) to prevent the assessment, levy and collection of certain taxes by the State of Montana based upon crude oil produced, under an oil and gas lease (R. 6), from lands situated on the Blackfeet Indian Reservation, allotted under trust patents by the terms of which the oil, gas and other minerals in and under such lands were reserved to the United States for the benefit of the Blackfeet Indian Tribe, pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17). (R. 23). The oil and gas lease involved was executed by the Superintendent of the Reservation on behalf of the Tribe (R. 11), and was approved by the Secretary of the Interior (R. 14). The Board of Equalization of Montana seeks to assess, levy and collect certain taxes on crude oil produced by petitioner under said lease during the years 1934 and 1935, as follows:

(a) Gross Production Tax (a license or occupational tax) provided for by Secs. 2397-2405, Revised Codes of Montana, 1921, as amended (R. 4, 5).

(b) Net Proceeds Tax on lessor's and lessee's interest (a substitute for an ad valorem tax on the value of the lease), provided for by Secs. 2088-2096, Revised Codes of Montana, 1921, as amended (R. 4, 5).

The complaint alleges that on July 10, 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians, was the owner of the oil, gas and other minerals in and under the land involved, and that on said date such oil and gas were leased by the superintendent

of the Blackfeet Agency to petitioner's predecessor, (R. 1, 2); that during the years 1934 and 1935, petitioner produced crude oil from wells drilled on said premises (R. 3); that the defendants are attempting to assess, levy and collect the above described taxes on such production (R. 4, 5); that such taxes are based upon crude oil produced by petitioner as an instrumentality and agent of the United States not taxable by the State of Montana (R. 5). Defendants' demurrer admits the facts alleged (R. 21). It was stipulated by counsel for both parties that all of the lands embraced in the lease were granted to individual Indians by trust patents under the provisions of the Act of June 30, 1919 (41 Stat. 17) in form identical with the trust patent attached to such stipulation (R. 23).

The complaint in intervention of the Blackfeet Tribe (R. 17-21) seeks to prevent the levy, assessment and collection of a net proceeds or royalty tax on the royalty interest of the Tribe, as depriving the Tribe of property without due process of law in violation of the provisions of the Constitution of the United States, as impairing the obligations of contracts, treaties, and agreements between the Tribe and the United States, and between the United States and the State of Montana, in violation of the Constitution of the United States and the State of Montana, and that such taxes would constitute a direct burden upon property of the United States.

The decision of the Supreme Court of Montana sustained defendants' demurrers to the complaint and complaint in intervention and dismissed the complaint and complaint in intervention on the merits (R. 25 and 36).

Motion for rehearing was denied (R. 49).

Judgment and decree is in accordance with the decision, and sustained the defendants' demurrers and dismissed the complaint and complaint in intervention (R. 49-50).

IV.

Specifications of Error.

1. The Supreme Court of Montana erred in sustaining defendants' demurrers to petitioner's complaint and to the complaint in intervention of the Blackfeet Tribe, and dismissing said complaint and complaint in intervention in this, that its opinion and judgment disregarded the leasing provisions found in the Act of June 30, 1919 (41 Stat. 17), which specifically provide the manner in which the minerals in the lands which were allotted pursuant to that Act shall be leased, that is, under such terms and conditions as the Secretary of the Interior shall prescribe.

2. The Supreme Court of Montana erred in dismissing petitioner's complaint and the complaint in intervention of the Blackfeet Tribe in this, that by its opinion and judgment said Court determined and held that the lands embraced in the involved lease, so far as the oil, gas and other minerals therein are concerned, are unallotted lands in an Indian Reservation, and, therefore, that the lease embracing the same was executed pursuant to the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.), and accordingly that such oil and gas are taxable by the State of Montana by virtue of the Congressional consent contained in that Act.

3. The Supreme Court of Montana erred in sustaining respondents' demurrers to petitioner's complaint and the complaint in intervention of the Blackfeet Tribe, and

dismissing said complaints in this, that its opinion and judgment permit taxation by the State of Montana of property of the United States, and the taxing of an instrumentality of the United States.

V.

Summary of Petitioner's Contentions.

1. The State of Montana, acting through respondents, seeks to assess against, levy upon, and collect from petitioner two separate taxes provided for by the laws of Montana:

(a) A net proceeds, or ad valorem tax, based upon the production of oil and gas;

(b) A gross proceeds, or license tax, based upon the production of oil and gas.

2. The oil and gas lease here involved embraces lands situated within the Blackfeet Indian Reservation held under an individual trust allotment, as to which the oil and gas were reserved to the United States for the benefit of the Blackfeet Indian Tribe.

3. The oil and gas in and under the lands embraced in the lease are the property of the United States and the production thereof may not be taxed by the State of Montana without the specific consent of the United States.

4. The oil and gas in and under the lands embraced in the lease here involved was reserved to the United States for the benefit of the Blackfeet Tribe under the provisions of the Act of June 30, 1919, 41 Stat. 3-17, which section, together with the Act of September 20,

1922, c. 347, 42 Stat. 857, provides for the leasing of such lands for oil and gas production.

5. The Blackfeet Indian Reservation is a "treaty" and not an "executive order" reservation, and the consent to taxation provided for in 44 Stat. 1347, (U. S. C. A. Title 25, Sections 398 a, b, and c) does not apply to the lands here involved.

6. The land here involved is not unallotted land within the provisions of the Act of May 29, 1924, 43 Stat. 244, U. S. C. A. Title 25, Section 398, and the consent to taxation therein contained does not apply to the lands here involved.

7. Neither the Act of June 30, 1919, (41 Stat. 3-17) nor the Act of September 20, 1922, c. 347 (42 Stat. 857) (U. S. C. A. Title 25, Section 400), which provide specifically for the leasing of allotted and unallotted lands on the Blackfeet Reservation contain any consent to the levy of taxes by the State.

8. Petitioner, as lessee of the oil and gas reserved by the United States for the benefit of the Blackfeet Indian Tribe, is an instrumentality of the United States in producing such oil and gas, and, as such, is not subject to the taxes here sought to be assessed, levied and collected.

VI.

ARGUMENT.

A.

Taxes Involved.

1. Net Proceeds Tax. (Secs. 2088-2096 Revised Codes, Montana 1921, as amended by Laws 1935, Chap. 188, and Laws 1925, Chap. 143):

Laws 1935, Chap. 188:

"Sec. 5. On or before the fifteenth day of June in each year, the State Board of Equalization shall transmit to the county clerk of each county in which such mines and mining claims are situated, the valuation of the net proceeds of such mines and mining claims for the purpose of taxation, as the same have been determined and fixed by such State Board of Equalization, and the county clerk shall immediately enter the same upon an assessment roll.

"Sec. 6. At the time of transmitting net proceeds assessments the State Board of Equalization shall also transmit the royalty lists or schedules to the county clerk of each county in which such mines and mining claims are located and thereupon the county clerk shall prepare from such net proceeds and royalty assessments a tax roll which shall be by him furnished to the county treasurer on or before the twentieth day of August following, upon which date said taxes shall be due and payable. The county clerk shall enter such assessments in the personal property assessments book under the name of the operator of such mine or mines, and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and the same shall be payable by, and shall be collected from, such operators as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

Laws 1925, Chap. 143:

> "The taxes on such net proceeds must be levied as the levy of other taxes are provided for, and every such tax is a lien upon the mine or mining claim from which the ore or mineral products or deposits are mined or extracted, and is a prior lien upon all personal property and improvements used in the process of extracting such ore or mineral products or deposits."

This tax is upon the lessee's interest and the lessor's royalty, and is a substitute for an ad valorem tax on the lease.

Byrne v. Fulton Oil Co., 85 Mont. 329, 278 Pac. 514;

Thus it is, in effect, a tax on the realty, as under the Montana rule, the oil and gas in place does not pass by the execution of an oil and gas lease.

Homestake Exploration Co. v. Schoregge, 81 Mont. 604, 264 Pac. 388;
Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;

2. Gross Proceeds Tax. (Sections 2397-2405, Revised Codes, Montana, 1921, as amended by Laws 1923, Chap. 67, Sec. 1):

> "Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the business or owning, controlling, managing, leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the

state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in and carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year."

This is a license tax.

Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353.

B.

Ownership of the Oil and Gas.

The trust allotment covering the lands here involved contains the following provision, (R. 23):

"reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919, (41 Stat. 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct."

The Act of June 30, 1919 (41 Stat. 17) provides:

"The Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not heretofore allotted * * *

"Provided, That of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable and nontaxable until Congress shall otherwise direct; * * *

"Provided, further, That any and all minerals, including coal, oil and gas, are hereby reserved for the benefits of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly;

> Provided, That the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

In connection with the mineral interest so reserved the Supreme Court of Montana said in its decision (R. 32):

> "As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe."

At the time of the execution of the lease, therefore, ownership of the oil and gas was in the United States for the benefit of the Blackfeet Tribe. The execution of the lease did not divest the title of the United States.

Homestake Exploration Co. v. Schoregge, 81 Mont. 604, 264 Pac. 388;

Cases based upon the Texas Rule that an oil and gas lease constitutes a transfer of the oil in place are not in point.

C.

Without the Consent of the United States Neither the Oil Nor the Production Thereof May Be Taxed.

This rule was recognized by the Supreme Court of Montana in its decision herein (R. 30, 31) and in its decision in a companion case.

Santa Rita Oil & Gas Co. v. Board, 54 Pac. (2d) 117 (not yet officially reported).

It is the rule adhered to by this Court.

Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338;
Burnet v. Coronado O. & G. Co., 285 U. S. 393, 76 L. Ed. 815;
Indian Terr. Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779;
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234;
Howard v. Gypsy Oil Co., 247 U. S. 503, 62 L. Ed. 1239;
Large Oil Co. v. Howard, 248 U. S. 549, 63 L. Ed. 416;
Jaybird Mining Co. v. Weir, 271 U. S. 609, 70 L. Ed. 1112;
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 70 L. Ed. 384;
Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 75 L. Ed. 1032;
United States v. Rickert, 188 U. S. 432, 47 L. Ed. 532;
Childers v. Beaver, 270 U. S. 555, 70 L. Ed. 730;
Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478.

The exemption is provided for in the Enabling Act of the State of Montana (25 Stat. 677):

> "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is recognized by various Constitutional provisions and Statutes of Montana:

Ordinance No. 1, Sec. 2:

> "That no taxes shall be imposed by the State of Montana on lands or property therein belonging to,

or which may hereafter be purchased by the United States or reserved for its use."

Constitution, Art. XII, Sec. 2:

"The property of the United States shall be exempt from taxation."

Laws of Montana, 1931, Chap. 98:

"The property of the United States (is) exempt from taxation."

See also:

Ford v. The City of Great Falls, 46 Mont. 292, 127 Pac. 1004;

City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638;

Three Forctops v. Ross, 73 Mont. 6, 235 Pac. 334;

Barnsdall Refineries v. Commission, 171 Okla. 145, 41 Pac. (2d) 918;

Taber v. Indian Terr. Oil Co., (Okla.) 57 Pac. (2d) 1167.

The exemption has been sustained as to income taxes, *(Gillespie v. Oklahoma*, 257 U. S. 501); gross production taxes, *(Howard v. Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co. v. Howard*, 248 U. S. 549; *Choctaw O. & G. Ry. Co. v. Harrison*, 235 U. S. 292); ad valorem taxes, *(Jaybird Mining Co. v. Weir*, 271 U. S. 609); occupation or license taxes, *(Choctaw O. & G. Ry. Co. v. Harrison*, 235 U. S. 292); royalty tax, *(Carpenter v. Shaw*, 280 U. S. 363, 74 L. Ed. 478).

Neither the state legislature nor the state court, by giving a tax a particular name, or by the use of some form of words, can take away the duty of this Court to consider the real nature and effect of the tax.

Choctaw O. & G. Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

D.

The United States Has Not Consented to the Imposition of the Taxes Here Involved.

In what has been said before, the Supreme Court of Montana agreed with petitioner's contentions. Unless, therefore, there is statutory authority and consent for the imposition of these taxes, the decision of the State Court was erroneous.

In the State Court counsel for respondents took two positions: (1) That the Blackfoot Reservation is an "executive order" reservation and that consent to the imposition of the taxes is found in Section 398, a, b, and c, Title 25, U. S. C. A. (44 Stat. 1347); (2) That the lands were unallotted lands within the provisions of Section 398, Title 25, U. S. C. A., (43 Stat. 244), and that the consent contained in that statute applied. We shall here take up these contentions seriatim.

At the outset it must be borne in mind that the net proceeds tax here sought to be levied affects not only the lessee's interest but also the royalty interest of the Blackfeet Indians. Thus, not only is an instrumentality of the United States sought to be taxed, but the interest of the Indians is directly affected. In such case two rules of construction must be applied: (1) the statutes involved must receive a liberal construction in favor of the Indians; and, (2) the presumption is against any consent to taxation.

Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;
Gleason v. Wood, 224 U. S. 679, 56 L. Ed. 947;
Choate v. Trapp, 224 U. S. 665, 56 L. Ed. 941.

1. *The Blackfeet Indian Reservation is a "treaty" and not an "executive order" reservation.*

Sections 398, a, b and c. Title 25, U. S. C. A., (44 Stat. 1347), which counsel for respondents sought to have applied in the State Court are as follows:

398 (a):

> "Unallotted lands within the limits of any reservation or withdrawal created by executive order for Indian purposes or for the use or occupancy of any Indians or tribes may be leased for oil and gas mining purposes in accordance with the provisions contained in Section 398 of this Title."

398 (b):

> "The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within executive order Indian reservations or withdrawals shall be deposited in the treasury of the United States to the credit of the Tribe of Indians for whose benefit the reservation or withdrawal was created, or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians; Provided, that such Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress."

398 (c):

> "Taxes may be levied and collected by the State or local authority, upon improvements, output of mines or oil and gas wells or other rights, property or assets of any lessee upon lands within executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and

such taxes may be levied against the share obtained for the Indians as bonuses, rentals and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the treasury; provided, that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The Supreme Court of Montana, in its decision, held that the Blackfeet Reservation was a "treaty" and not an "executive order" reservation, and that the above sections had no application herein (R. 30). In reaching this conclusion, it followed its decision in the companion cause of *Santa Rita Oil & Gas Company v. Board,* 54 Pac. (2d) 117. The chronological history of the Blackfeet Reservation is substantially as follows:

On October 17th, 1855, a treaty was made and concluded within what is now the State of Montana, then in the Territory of Nebraska, between the commissioners on the part of the United States and the Blackfeet Tribe and other Tribes of Indians (11 Stat. 657). By Article IV a tract of country was described which "shall be the territory of the Blackfoot Nation, over which said Nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty." By Article VII it was agreed that the citizens of the United States might live and pass unmolested through the countries occupied and claimed by the Indian Tribe. By Article VIII consent was given to the United States to construct roads, lines of telegraph and military posts, to build houses for agencies, missions, schools, etc., and to occupy permanently as much land as might be necessary for the various purposes enumerated, including the use of wood for fuel and land for grazing; the navigation of all lakes and streams was declared to be forever free to the citizens

of the United States. This treaty was ratified by the Senate of the United States on April 15, 1856, (11 Stat. 662), and on April 25, President Franklin Pierce accepted, ratified and confirmed the treaty. On July 5, 1873, President Grant, by executive order, on the recommendation of the Department of the Interior, withheld from entry and settlement as public lands all of that portion of the State of (then Territory of) Montana lying west of the Territory of Dakota, north of the Missouri River and the Sun River, and east of the Continental Divide, and ordered that the same be set apart, as a reservation for the Blackfeet Tribe and other Tribes therein enumerated. *Kappler's Indian Affairs*, Vol. 1, P. 854.

Congress, by the Act of April 15, 1874 (18 Stat. 28) provided that a described tract of country in the Territory of Montana "be, and the same is hereby, set apart for the use and occupation of the" Blackfeet Tribe, and other Tribes therein enumerated. This tract was somewhat less than, but within the area described by President Grant, in his executive order of July 3, 1873. President Grant, by executive order on August 19, 1874, directed that the tract included in his executive order of July 5, 1873, and not embraced within the tract set apart by the Act of Congress of April 15, 1874, be set apart for the use and occupation of the Blackfeet Tribe and other Tribes. President Hayes, by executive order on July 13, 1880, added certain additional territory to the Blackfeet Reservation. *Kappler's Indian Affairs*, Vol. 1, P. 856. Congress, by the Act of May 1, 1888, approved an Agreement theretofore made between the commissioners on the part of the United States and the Blackfeet, whereby the Blackfeet Reservation was distinctly described (25 Stat. 129), and in consideration of which they relin-

quished their claim to much of the land theretofore included within their reservation. Another and later Agreement with the Blackfeet, approved by Act of Congress on June 10, 1896 (29 Stat. 353), still further reduced the reservation. By Article V of the Agreement it was expressly provided that there should be no allotment in severalty of the land, but that the whole reservation should continue to be held by these Indians as a communal grazing tract. By the Act of March 1st, 1907 (34 Stat. 1035) it was provided: "That as soon as all the lands embraced within the said Blackfeet Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on said reservation. That there shall be allotted to each member forty acres of irrigable land and two hundred and eighty acres of additional land valuable only for grazing purposes; or, at the option of the allottee, the entire three hundred and twenty acres may be taken in land valuable only for grazing purposes.

The Blackfeet Reservation was *created* by treaty, and this Court will take judicial notice of that fact.

Hudson Oil Co. v. Board, —— Wyo. ——, 52 Pac. (2d) 683 (Shoshone Reservation).

See also:

Clairmont v. United States, 225 U. S. 551, 56 L. Ed. 1201 (Flathead Reservation);

Spalding v. Chandler, 160 U. S. 394, 40 L. Ed. 469;

State v. Big Sheep, 75 Mont. 219 (Crow Reservation).

The decision of the State Court with respect to the inapplicability of Sections 398 a, b, and c was correct.

2. *The provisions of the Act of May 29, 1924, 43 Stat. 244, (Section 398, Title 25, U. S. C. A.) are not applicable here.*

The Act of May 29, 1924, (43 Stat. 244) is as follows:

> "An Act to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian Reservations affected by the proviso to Section 3 of the Act of February 28, 1891.
>
> "That unallotted land on Indian reservations other than lands of the five civilized tribes and the Osage Reservation, subject to lease for mining purposes for a period of ten years under the proviso to Section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, Page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands; Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

The proviso to Section 3 of the Act of February 28,

1891, (26 Stat. 795) to which Section 398 refers, appears as Section 397, Title 25, U. S. C. A. It provides:

> "Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed * * * ten years for mining purpose * * *."

Petitioner contends that the above sections do not apply for the following reasons:

(a) Specific provisions for the leasing of lands on the Blackfeet Reservation have been made by statute.

A review of the legislation of the Congress discloses a clear intention to deal specifically and individually with the Blackfeet Indian Reservation with respect to allotments and leases.

The general allotment Act (24 Stat. 388) became effective February 8th, 1887. Such Act purports to provide for the allotment of lands upon all reservations. Yet on February 11, 1887, a treaty was entered into with the Blackfeet covering, among other things, the allotment of lands on that reservation. This treaty was ratified by the Congress on May 1, 1888 (25 Stat. 113). The general allotment Act (24 Stat. 388) was amended February 28, 1891, (26 Stat. 794). On September 26, 1895 (29 Stat. 350), however, a treaty with the Blackfeet was ratified providing, among other things, that *no allotments* in severalty should be made upon the Blackfeet Reservation until requested in writing by a majority of the adult male members of the Tribe.

This was followed by the Act of March 1, 1907 (34 Stat. 1015-1035) specifically providing for the allotment

of lands on the Blackfeet Reservation. This latter Act was amended by the Act of June 30, 1919 (41 Stat. 17), which again deals specifically with the Blackfeet Reservation, both with respect to the allotment of land and with respect to the leasing of lands containing minerals.

On September 20, 1922, (42 Stat. 857) the Congress again specifically provided for the leasing of land on the Blackfeet Reservation for mining purposes.

The oil and gas here under consideration were reserved to the United States under the provisions of the Act of June 30, 1919 (41 Stat. 17) which provides:

> "The Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not theretofore allotted. * * *
>
> "Provided, that of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable and non-taxable until Congress shall otherwise direct; * * *
>
> "Provided, further, That any and all minerals, including coal, oil and gas are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

The Act of September 20, 1922 (42 Stat. 857), Section 400, Title 25, U. S. C. A., also specifically refers to the Blackfeet Reservation as follows:

> "Lands reserved for school and agency purposes and all other unallotted lands on the Fort Peck and

Blackfeet Indian Reservations, in the State of Montana, reserved from allotments or other disposition may be leased for mining purposes under regulations prescribed by the Secretary of the Interior."

We find, then, a clear intention on the part of the Congress to deal with the Blackfeet Reservation outside of the general allotment and leasing statutes applicable to Indian Tribes and reservations in general. Thus, clearly, the general allotment statutes do not apply, for if they do the provisions therein contained, (24 Stat. 389, 31 Stat. 1085), that the land shall be held in trust *"for the sole use and benefit of the Indian* to whom such allotment shall have been made," and that at the expiration of the trust period the land shall be conveyed to the Indian *"free and clear of all charge or incumbrance whatsoever,"* are violated by the reservation of the oil and gas to the United States.

Adams v. Henderson, 168 U. S. 573, 42 L. Ed. 584;
Adams v. Reed, 11 Utah 480, 40 Pac. 720;
Stambaugh v. Smith, 23 Ohio St. 584.

Their place is taken by 41 Stat. 17, under which the oil here involved was reserved. In an equal degree, Sections 397 (26 Stat. 795) and 398 (43 Stat. 244) are general in their nature and do not change or repeal the specific statutes relating to the Blackfeet Reservation. In neither 397 nor 398 does there appear any intent, either expressed or implied, that the course pursued by the Congress in dealing specifically with the Blackfeet is to be altered in any respect. The intent, clearly, is otherwise. In neither 397 nor 398 do we find any express words repealing or amending 41 Stat. 17. The presumption is that no implied repeal was intended.

In re Crow Dog, 109 U. S. 556, 27 L. Ed. 1030;

United States v. Newton, 36 Fed. (2d) 425.

It is a rule of universal application that, under such circumstances, the statute dealing specifically with the subject matter must be applied.

Frost v. Wenie, 157 U. S. 46, 39 L. Ed. 614;
United States v. Nix, 189 U. S. 199;
Hemmer v. United States, 204 Fed. 898;
Lewis Statutory Construction (2nd Ed.) 526;
59 *C. J.* 1056.

Applying the above rules of construction and having in mind the intention of the Congress as expressed over a long period of years, it is clear that the provisions of 41 Stat. 17 must govern with respect to the leasing of the lands here involved. Neither 41 Stat. 17 nor 42 Stat. 857 contains a consent to the levying of taxes by the State. Without such consent the conclusion of the State Court was erroneous.

In closing this portion of our argument we may point out that the action of the Congress in dealing specifically with the Blackfeet is not unusual.

See:

43 Stat. 111 (Kaw Reservation—specifically consenting to taxation);
34 Stat. 539 (Osage Allotment Act);
43 Stat. 376 (Eastern Cherokees);
41 Stat. 1355 (Gros Ventre);
25 Stat. 642 (Chippewa).

(b) The lease and minerals here involved are not "unalotted" lands within the provisions of Section 398 (43 Stat. 244).

The land from which the oil has been produced was allotted August 11, 1922, to an individual Indian (R. 23, 24) under the provisions of 41 Stat. 17 (R. 28). By its plain provisions and title, Section 398 (43 Stat. 244) refers only to "unallotted" lands on Indian reservations affected by the proviso to Section 3 of the Act of February 28, 1891. This proviso, which, as we have seen, appears as Section 397, Title 25, relates only to lands *"not desired for individual allotments."* In other words, both 397 and 398 relate to unallotted tribal lands and not to lands allotted to individual Indians as is the situation here.

Strawberry Valley Cattle Co. v. Chapman, 13 Utah 454, 45 Pac. 348;
Kirby v. United States, 273 Fed. 391;
White Bear v. Barth, 61 Mont. 322, 203 Pac. 517.

We are confirmed in our conclusion that Sections 397 and 398 do not apply by an analysis of the various Statutes dealing with lands on the reservation.

On the Blackfeet Reservation there are four classes of land ownership, viz.: (1) Tribal lands; (2) lands allotted in trust without reservation of minerals; (3) lands allotted in trust with reservation of minerals; and (4) lands patented in fee. Lands patented in fee and the production of oil therefrom are taxable (Section 349). Lands allotted in trust without reservation are not taxable (Section 396) because no consent to such taxation is given.

Santa Rita Oil & Gas Co. v. Board, 54 Pac. (2d) 117.

Tribal lands and oil produced therefrom are taxable under Sections 397, 398 and 399.

But lands allotted in trust with respect to which the minerals have been reserved under 41 Stat. 17 are not taxable for the reason that there is no statutory provision allowing such taxation.

This classification of lands and the statutes applicable thereto is proper and logical. If such classification is not made, and respondents' contention that Section 398 applies, accepted, this Court is compelled to assume contrary to the plain intent of the Congress and contrary to the general rules of construction, that (1) the general provisions of Section 398 impliedly repeal or amend the specific provisions of 41 Stat. 17; (2) that lands *allotted* to individual Indians with minerals reserved to the United States are *unallotted* lands within the meaning of Section 398; and (3) that lands allotted to individual Indians with minerals reserved to the United States under the provisions of 41 Stat. 17 are lands "not desired for individual allotments" under the provisions of Section 397.

To merely state the necessary results of respondents' contentions would seem to demonstrate the fallacies therein.

Sections 397 and 398 provide for the leasing of "unallotted *lands*"—of *lands* "not desired for individual allotments." On the other hand, 41 Stat. 17 specifically provides for an allotment of lands on the Blackfeet Reservation, and further provides "that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe." In other words, 41 Stat. 17 while providing expressly for an allotment, allows a mineral lease by the Secretary. Sections 397, 398 and 399 assume that no allotment has been made, and that the land is not desired for individual allotments.

It is the theory of petitioner that the lease here under consideration is a lease upon allotted lands specifically provided for by 41 Stat. 17. If, however, we assume that the lands, so far as concern the minerals thereunder, are unallotted, as contended for by respondents and determined by the State Court (R. 32), then clearly the Act of September 20, 1922 (42 Stat. 857) applies, for therein we find specific provision for the leasing of unallotted lands on the Blackfeet Indian Reservation "reserved from allotment or other disposition." Respondents contended and the State Court held that the minerals were "unallotted lands" because they were reserved from allotment, a decision bringing the situation exactly within the provisions of 42 Stat. 857, and eliminating Section 398 from further consideration.

In the State Court it was suggested by counsel for respondents that from the last proviso contained in Section 398 it might be concluded that the land or property of an individual allottee was intended. But there can be no individual owner of unallotted land (31 C. J. 491); the proviso simply protects the Tribal land against any lien provided for in the State Statute.

(c) The Department of the Interior has not construed Section 398 as being applicable.

The lease here involved states that it is made "under and in" pursuance of Section 3 of the Act provided February 28, 1891 (26 Stat. L. 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress) (R. 7).

Section 3 of the Act of February 28, 1891 (26 Stat. 795) is Section 397 and the Act of May 29, 1924, is Section 398, both discussed in the next preceding section of this Brief.

From the above reference in the lease counsel for respondent argued and the Supreme Court of Montana concluded that Section 398 had been construed by the parties and the Department of the Interior to be applicable (R. 32).

The lease is upon a printed form, furnished by the Interior Department (Regulations, Department of Interior, July 23, 1924). As to its provisions the lessee had no choice. Upon its face it purports to be a lease of "Tribal Indian Land" (R. 6). It contains no provision protecting the Indian allottee or his property, save a general provision requiring that the lessee commit no waste. It apparently contemplates the erection of buildings and permanent improvements upon the surface (R. 9). It provides that if "usable water" is developed, it shall be turned over to the "reservation" (R. 9), and not the owner of the surface, as would naturally follow with respect to the condition here presented. Under such circumstances, it is not clear whether the mere use of a printed form containing inapplicable and erroneous references and provisions may be considered as a construction by the Department of the Interior. While it is doubtless true that a construction by the executive department is entitled to consideration,

> *Hawley v. Diller,* 178 U. S. 476, 44 L. Ed. 1157;
> *United States v. Johnson,* 124 U. S. 197, 31 L. Ed. 389,

yet the application of such rule to a given case assumes (1) a uniform construction for an appreciable length of time,

> *Louisville & N. R. Co. v. United States* 282 U. S. 740, 75 L. Ed. 672,

and (2) a construction that is not clearly erroneous,

United States v. Finnel, 185 U. S. 236, 46 L. Ed. 890,

and (3) a construction that is reasonable,

Robinson v. Lundrigan, 227 U. S. 173, 57 L. Ed. 468.

The supposed construction here contended for satisfies none of these requirements.

The lease form, which is a part of the government's regulations, was prepared with "unallotted tribal lands not needed for farming or agricultural purposes" in mind. (Regulations approved July 23, 1924.) Such regulations and lease form relate only to leases given under the proviso to Section 3 of the Act of February 28, 1891 (26 Stat. 795); the Act of May 29, 1924 (Sec. 398); and Section 26 of Act of June 30, 1919 (41 Stat. 31) as amended by 41 Stat. 1225-1231.

Since an allotment to an individual Indian presupposes that the land may be utilized for agricultural purposes (Sec. 331, Title 25), it can hardly be urged that the regulations here are a construction that leases of lands under 41 Stat. 17 are within the provisions of Sections 397 and 398.

Doubtless, the true situation is expressed in a statement by the First Assistant Secretary in a letter to the Attorney General:

> "Before any oil and gas mining leases were consummated on Blackfeet lands allotted under the Act of June 30, 1919, consideration was given to the matter of drafting regulations and a lease form. The conclusion was reached that the tribal regulations promulgated under the provisions of Section 3 of the Act of February 28, 1891, and the lease form prescribed thereunder would be satisfactory for use in

> leasing these lands. It was merely an oversight in this case not to strike out the reference in the lease form to Section 3 of the Act of February 28, 1891, as amended by the Act approved May 29, 1924, and insert in lieu a reference to the Act of June 30, 1919."

See also the construction by the Commissioner of Indian Affairs (R. 43, 44).

Under such circumstances it can not be contended that we have a uniform construction that Section 398 applies. If anything, the reverse is true.

In other words, the lease form here used is a part of the regulations promulgated by the Secretary expressly under the provisions of Sections 397 and 398, and which have nothing whatever to do with leases specifically provided for under 41 Stat. 17 and Section 400.

But assuming that there is such a uniform construction as is contended for by the respondents, such construction is clearly erroneous and unreasonable.

Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a Statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed.

> *Louisville & N. R. Co. v. United States,* 282 U. S. 740, 75 L. Ed. 672.

Situations somewhat similar, with respect to executive construction concerning the applicability of certain Statutes have heretofore arisen. In this connection the Court's attention is directed to a line of cases involving the issuance of patents to Indians who made homestead

entries on public lands under the Act of March 3, 1875 (18 Stat. L. 402) which provides that title to the lands should be inalienable for a period of five years from the date of issuance of the patent. In many of the cases where entries were made by Indians under the above cited Act, the patent was issued under the provisions of the Act of January 18, 1881 (21 Stat. L. 315) which declared that the land should be inalienable for a period of twenty years. It was an error on the part of the General Land Office to issue such patents, as the provisions of the Act of January 18, 1881, supra, concerning the issuance of patents, apply only to Winnebago Indians in Wisconsin. It has been uniformly held that such patents were erroneously issued and that there should be read into these patents the provisions of the Act under which the homestead was taken.

See:

Hemmer v. United States, 204 Fed. 898 (affirmed 241 U. S. 380);
United States v. Saunders, 96 Fed. 268;
Frazee v. Piper, 51 Wash. 278, 98 Pac. 760;
Felix v. Yaksum, 77 Wash. 519, 137 Pac. 1037.

From what has been said in the previous sections of this Brief, it clearly appears that the lease was not, and could not have been given under the provisions of Section 398. Just as clear is it that the lease must have been executed under either 41 Stat. 17, or Section 400. In either case there was, and is no consent to taxation, and a supposed erroneous construction by the Interior Department cannot create such a consent and so divest either the Blackfeet Tribe or petitioner of their right to immunity from taxation.

It is respectfully submitted that the decree of the Supreme Court of Montana should be reversed.

Respectfully submitted,

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